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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
HOW THE FEDERAL QUESTIONS WERE RAISED	5
REASONS FOR GRANTING THE WRIT	
I	
A TRIAL COURT CANNOT ADJUDICATE GUILT AND IMPOSE SENTENCE AFTER THE TERM OF COURT HAS PASSED	5
CONCLUSION	8
CERTIFICATE OF SERVICE	9

INDEX TO APPENDIX

APPENDIX A — Page

Opinion of the District Court of Appeal of Florida, Third District, April 1, 1970 — App. 1

APPENDIX B

Denial of Petition For Rehearing — App. 3

APPENDIX C

Denial of Petition For Writ of Certiorari by Supreme Court of Florida, June 23, 1970 — App. 5

APPENDIX D

Denial of Petition For Rehearing, September 14, 1970 — App. 7

APPENDIX E

Stay, Supreme Court of the United States — App. 9

TABLE OF AUTHORITIES

	Page
Butch v. State, 101 So.2d 869 (Fla. 1958)	7
Collier v. State, 197 So.2d 554 (Fla. 2nd Dist. 1967)	7
Helton v. State, 106 So.2d 79 (Fla. 1958)	7
Miller v. Adevhold, 288 U.S. 206, 53 S.Ct. 325 (1933)	7
State v. Evans, 225 So.2d 548 (Fla. 3rd Dist. (1969)	6

OTHER AUTHORITIES

Florida Rules of Criminal Procedure, Rule 1.670	5
Florida Statute 921.02	5

In the

Supreme Court

of the

United States

OCTOBER TERM, 1970

No. _____

GENNERO GALTIERI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the Opinion of the District Court of Appeal of Florida, Third District entered on April 1, 1970 and reported at 234 So.2d 172.

OPINIONS BELOW

Review is sought of the opinion of the District Court of Appeal of Florida, Third District, entered on April 1, 1970, and reported at 234 So.2d 172 (App. A). Petition for Rehearing was denied (App. B). Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied on June 23, 1970 (App. C). Petition for Rehearing in the Supreme Court of Florida was denied on September 14, 1970, (App. D). Application for Stay of Proceedings was denied in the Supreme Court of the United States on September 30, 1970 (App. E).

JURISDICTION

The decision of the District Court of Appeal of Florida entered on April 1, 1970 became final upon denial of Petition for Rehearing on April 23, 1970. Determination by the Florida courts became final upon denial of Petition for Writ of Certiorari on June 23, 1970, and subsequent denial of Petition for Rehearing on September 14, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States was denied by the District Court of Appeal of Florida, Third District. Jurisdiction is also invoked under Rule 19(1)(a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED

A TRIAL COURT CANNOT ADJUDICATE GUILT AND IMPOSE SENTENCE AFTER THE TERM OF COURT HAS PASSED.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE-SECTION 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES RULE 19

(1) (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

STATEMENT OF THE CASE

Defendant was tried by jury in the Criminal Court of Record in and for Dade County, Florida. On May 26, 1967, the jury returned a verdict of guilty (the defendant was charged with violation of Florida Statute 813.001 concerned with robbery). On the same day, the defendant was sentenced to twenty-five years in the State Penitentiary.

The defendant timely filed an appeal, and the opinion of the District Court of Appeal of Florida, Third District, entered on January 21, 1969, and reported at 218 So.2d 180, affirmed the judgment of the trial court. On this appeal the question of the omission of the trial court to adjudicate the defendant guilty of the crime charged in the indictment first arose. The Third District remanded the case to the Criminal Court of Record for the adjudication of guilt and sentence. The Criminal Court of Record, following the instructions of the District Court, adjudicated the defendant guilty and sentenced him to twenty-five years at the State Penitentiary on April 15, 1969, almost two years after the jury had been discharged in the original trial. The defendant then attempted to appeal that judgment and sentence, but the appeal was quashed on April 1, 1970 by the District Court of Appeal of Florida, Third District. Petition for Rehearing was denied on April 23, 1970. The defendant then filed a Petition for Writ of Certiorari to the Third District, but this Petition was denied on June 23, 1970. Petition for Rehearing was denied on September 14, 1970. An application for Stay of Proceedings to the Supreme Court of the United States was treated as an application for bail and denied on September 30, 1970.

HOW THE FEDERAL QUESTIONS WERE RAISED

1. The federal question was raised as follows:

   a. At the earliest opportunity, i.e. at the remand to the Criminal Court of Record for adjudication and sentencing.

   b. On appeal by assignments of error and in briefs.

   c. Brief in Support of Petition for Writ of Certiorari.

The trial court adjudicated the defendant guilty and sentenced him; the appellate court failed to find error; and the Supreme Court of Florida denied Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

POINT ONE

A TRIAL COURT CANNOT ADJUDICATE GUILT AND IMPOSE SENTENCE AFTER THE TERM OF COURT HAS PASSED.

The trial judge's adjudication of guilt after a jury has brought in a guilty verdict is not a meaningless phrase. The adjudication controls very substantial rights and when a defendant is adjudicated guilty of a felony, many civil rights, i.e. the right to vote, etc., are forever lost to him. The importance of the adjudication of guilt has been recognized by the legislature in Florida Statute 921.02, now codified in Florida Rules of Criminal Procedure 1.670:

> If the defendant has been convicted, a judgment of guilty, and if he has been acquitted, a judgment of not guilty, *shall* be rendered in open court *and* entered on the minutes of the court.

As the record reflects, after the jury returned a verdict of guilty, the court proceeded on May 16, 1967 to sentence the defendant, *without having first adjudicated his guilt*. This violation of the law was corrected on April 15, 1969 when the trial court, upon instructions from the Third District Court of Appeal, adjudicated the defendant guilty and sentenced him. This occurred approximately two years after the jury first returned the guilty verdict. Petitioner contends that the trial court was entirely without jurisdiction to adjudicate his guilt as more than one term of court had passed, and as to this defendant and this trial there was no longer "open court". There have been only a few cases that have discussed this point and none is squarely on point.

In one of the latest cases, *State v. Evans*, 225 So.2d 548 (Fla. 3rd Dist. 1969), the court held that a

> "Court which imposes a lawful sentence loses jurisdiction over the sentence (except to enforce it) upon the expiration of the term of court in which the sentence was imposed, unless some constitutional or statutory provision extends the trial court's control of its sentence for specific periods and purpose." *State v. Evans*, 225 So.2d 548 (Fla. 3rd Dist. 1969)

Thus it is apparent that a term of court does have legal importance and may destroy the jurisdiction in the trial court.

Other cases, dealing mainly with the court's attempt to place the defendant on probation without an adjudication of guilt have held that the court does not lose jurisdiction. *Batch v. State* 101 So.2d 869 (Fla. 1958); *Helton v. State* 106 So.2d 79 (Fla. 1958).

However, these cases are clearly distinguishable as the defendants were placed on probation while here the court imposed or attempted to impose a sentence. Furthermore, in those cases the court consciously withheld adjudication to aid the defendants. In the case at bar, no such intent was present, and the delay rather than being beneficial to the defendant was prejudicial to him because he was denied equal protection of the law which dictates that the same procedure should be followed for all defendants in criminal proceedings.

A case seemingly on point is *Collier v. State*, 197 So.2d 554, (Fla. 2nd Dist. 1967), in which the court found no basis for the defendant's contention that the court had no jurisdiction to adjudicate guilt and sentence him approximately three years after he was found guilty by a jury. The court cites no law in support of its holding, and petitioner contends that the decision is clearly wrong.

This Court, in *Miller v. Aderhold*, 288 U.S. 206, 53 S.Ct. 325 (1933) has followed the minority position (as of that date) which held that the court does not lose jurisdiction by the passage of a term where a void sentence was imposed. While that case could be strong authority for the opposing view to the petitioner, is distinguishable in that the adjudication of guilt is not involved, and thus this case is not controlling. This question is one of first impression in this Court. Petitioner contends that in ac-

cordance with the trend of Supreme Court decisions, this court should find that the trial court lacked jurisdiction to enter an adjudication of guilt and sentence because there was no longer an "open court" since the term of court had ended.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, should be granted, and the decision of that Court reversed.

Respectfully submitted,

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioner
2201 Collins Avenue
Miami Beach, Florida 33139

By _____
Milton E. Grusmark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true copies of the foregoing Petition for Writ of Certiorari were mailed to HON. EARL FAIRCLOTH, Attorney General, 1350 N. W. 12th Avenue, Miami, Florida and HON. EARL FAIRCLOTH, Attorney General, The Capitol, Tallahassee, Florida, this _____ day of December, 1970.

_____

APPENDIX

APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

No. 69-414

Gennero GALTIERI, Appellant,

v.

The STATE of Florida, Appellee.

April 1, 1970.

Rehearing Denied April 23, 1970.

Appeal from Criminal Court of Record, Dade County; Paul Baker, Judge.

PER CURIAM.

Appeal quashed.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1970

THURSDAY, APRIL 23, 1970

Case No. 69-414

GENNERO GALTIERI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

/s/ William P. Carter
Clerk District Court of
Appeal, Third District

cc: Milton E. Grusmark
Harold Mendelow
J. F. McCracken
/h

(THE FINAL ORDER IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1970

TUESDAY, JUNE 23, 1970

Case No. 39,665

DISTRICT COURT OF APPEAL, THIRD DISTRICT

GENNERO GALTIERI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ERVIN, C.J., ROBERTS, DREW, CARLTON and BOYD, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
SID J. WHITE
Clerk Supreme Court

cc: Honorable William P. Carter
Honorable J. F. McCracken
Honorable Paul Baker
Honorable Milton E. Grusmark
Honorable Harold Mendelow

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

JULY TERM A.D. 1970

MONDAY, SEPTEMBER 14, A.D. 1970

Case No. 39,665

GENNERO GALTIERI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On consideration of the Petition for Rehearing and Request for Delay of Issuance of Mandate,

IT IS ORDERED by the Court that said petition for rehearing and request for delay of issuance of mandate be and the same are hereby, denied.

A TRUE COPY,

TEST:

/s/ Sid J. White
SID J. WHITE
CLERK SUPREME COURT

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF JUNE 23, 1970, IN THE ABOVE CAUSE)

APPENDIX E

Office Of The Clerk
SUPREME COURT OF THE UNITED STATES
Washington, D. C., 20543

E. ROBERT SEAVER
Clerk of the Court

October 1, 1970

Milton E. Grusmark, Esq.
2201 Collins Avenue
Miami Beach, Florida 33139

RE: GENNARO GALTIERI v. FLORIDA
October Term, 1970

Dear Mr. Grusmark:

Your application for stay of proceedings in the Criminal Court of Record in and for Dade County, Florida, was presented to Mr. Justice Black, who returned it to this office with the following endorsement thereon:

"This application considered as an application for bail is denied. S/ Hugo L. Black
Sept. 30, 1970 Associate Justice."

Very truly yours,

E. ROBERT SEAVER, Clerk
By /s/ Michael Rodak, Jr.
Michael Rodak, Jr.
Deputy Clerk

jmh

cc: The Honorable Earl Faircloth
Richard E. Gerstein, Esq.